

**TESTIMONY OF
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U.S. DEPARTMENT OF COMMERCE**

ON AMENDMENTS TO THE ENDANGERED SPECIES ACT

**BEFORE THE COMMITTEE ON RESOURCES
U.S. HOUSE OF REPRESENTATIVES**

JUNE 19, 2002

Good afternoon, Mr. Chairman and members of the Committee. I am William T. Hogarth, Assistant Administrator for Fisheries at the National Oceanic and Atmospheric Administration (NOAA) at the Department of Commerce. I appreciate the opportunity to be here today to discuss H.R. 4840, the "Sound Science for Endangered Species Planning Act of 2002." I commend you and the Committee for your efforts to improve implementation of the Endangered Species Act (ESA)--and specifically, to ensure the best available science continues to guide agency actions and decisions regarding endangered and threatened species.

H.R. 4840 builds upon areas of consensus by codifying existing administrative policies, incorporating provisions similar to prior legislative efforts that have been supported by the previous Administration and members from both parties, and including portions of legislation introduced by members of this Committee. Although NOAA Fisheries has a few concerns that I will describe in my testimony, we anticipate that these can be resolved administratively or with the cooperation of the Committee. It is in this spirit that we join the Department of the Interior in supporting H.R. 4840, with modifications to address our concerns.

Since passage of the ESA almost 30 years ago, NOAA Fisheries, with the U.S. Fish and Wildlife Service (USFWS), has sought to administer the Act as efficiently and consistently as possible. As you know, our task has become quite challenging. As written, ESA requires NOAA Fisheries and USFWS to use the best available scientific and commercial data when evaluating the impact of actions on endangered or threatened species. When uncertainty exists, we must err toward the conservation of the species. However, we must also ensure that the policy decisions we make affecting a diverse range of interests are based upon sound science. This is difficult when decisions must be made using data and science that are still being developed, or does not have the confidence of the public.

The situation in the Klamath Basin demonstrates how difficult our policy decision making can become. In 1997, NOAA Fisheries listed Southern Oregon/Northern California Coast coho salmon as threatened under the Endangered Species Act. Critical habitat was designated shortly after that. We acknowledge that prior to 1997, very little information was available regarding the relationship between Klamath River flows and the biological requirements of salmon and steelhead. Coho salmon have been difficult to study both because of its life history, and because the populations of coho salmon have become depressed. Since 1997, a number of groups have gathered data and developed analyses regarding the relationship between the Klamath Project operations and river flows, fish habitat, and water quality.

NOAA Fisheries has worked diligently to understand and incorporate this information, almost as soon as we have received it, in conjunction with the annual planning process and consultations. During the development of the 2001 biological opinion, NOAA Fisheries considered all known minimum Klamath River flow recommendations developed over the past 50 years, including the Phase I Flow Study by the Institute for Natural Systems Engineering (The Hardy Study). Unfortunately, we did not have a great deal of recent data regarding the coho to analyze.

On March 13th, I testified before this Committee regarding the National Academy of Sciences' draft report on NOAA Fisheries' 2001 biological opinion regarding coho salmon in the Klamath Basin. The Academy concluded that "there is no substantial scientific foundation at this time for changing the operation of the Klamath project to maintain...higher minimum flows in the Klamath River main stem for the threatened coho population." On June 1st, NOAA Fisheries issued a biological opinion that will begin to develop and implement a research program to identify and fill gaps in existing knowledge and, hopefully, produce better, peer-reviewed science in the Klamath Basin.

We have many more examples of how we currently integrate science into policy decisions, and I would be happy to discuss those with you further. However, I will now provide specific comments on sections of H.R. 4840.

Section 2(b),(d)--Sound Science in Decisions

H.R. 4840 includes provisions which would require the Secretary to give greater weight to scientific or commercial studies or other information that are empirical or have been field-tested or peer-reviewed when making decisions about listing, delisting, or when designating critical habitat. The agencies would be required to promulgate regulations establishing criteria for scientific and commercial data, studies, and other information used as a basis for these determinations. It would also prohibit the agencies from determining that a species is endangered or threatened unless data collected in the field support the determination.

We support the goal of basing our decisions on sound and peer reviewed science. In prior testimony, we have expressed concerns about giving greater weight to scientific or commercial data that are empirical or field tested, because we acknowledge that there are also other scientific methods (e.g., modeling and statistical analyses) that produce valuable scientific data. While it is usually a combination of various types of scientific data that have formed the basis of our evaluations, we recognize that utilizing empirical and peer-reviewed information enhances public confidence in decisions.

Section 2(c)--Contents of Listing Petitions

We commend Section 2(c) of the bill, which outlines measures to ensure the sufficiency of the contents of petitions to add a species to the list of threatened or endangered species. This language is similar to current policies used by NOAA Fisheries to determine whether a petition presents information that would lead a reasonable person to believe that the petitioned action may be warranted. The provision will help ensure the consistency and integrity of information considered in listing petitions.

Section 3--Independent Scientific Review

This section would require the agencies to use independent scientific review boards to review decisions to list a species, delist a species, or develop a recovery plan. Agencies would also be required to employ a review board if they determined that a proposed Federal action is likely to

jeopardize the continued existence of a species, and also in cases where the Secretary finds that there is significant disagreement regarding a determination or proposal, or that a determination may have significant economic impact. The section defines who is qualified to sit on a review board, how the list of reviewers should be developed, the appointment of the boards, how many reviewers should sit on the board, their compensation (GS-14 pay), who may appoint boards (only those who have been confirmed by the Senate), and how the agencies will consider the opinions of reviewers. The Administration opposes the compensation provision, however, because it would require several million dollars not included in the Department of Commerce's budget.

Currently, NOAA Fisheries incorporates independent peer review in listing and recovery activities during the public comment period. We would like to work with the Committee to ensure that these requirements would not duplicate, override, or compete with existing federal, state, tribal, and local efforts to provide personnel and resources for peer review of ongoing species recovery projects, such as the Independent Scientific Review Panel that currently reviews salmon recovery projects in the Columbia River Basin in the Pacific Northwest. Also, we would caution that new independent scientific review requirements will create new demands on the agencies without changes to statutory deadlines.

We commend this section of the bill for allowing the Secretary the flexibility to determine whether a review board is necessary for biological opinions that conclude that actions may jeopardize species. However, we would want to work to ensure that the requirement for a review of certain jeopardy opinions would not delay the completion of the biological opinion or economic activities that require a biological opinion. We are open to working with the Committee to ensure that a process is developed to maintain timely biological opinions.

We believe that the discretion to employ review boards must be consistent for all listing decisions, including decisions not to list a species. The Secretary should be allowed the flexibility to convene a review board for non-jeopardy biological opinions as well as jeopardy opinions. This would ensure that all decisions are supported by a rigorous review process.

Section 4—Interagency Cooperation - Consultations under Section 7 of ESA

We commend Section 4 of the bill, which would require NOAA Fisheries and USFWS to actively solicit and consider information from every affected state. We currently include information from states in recovery activities, and this provision will strengthen the cooperation between the states and the Federal Government.

NMFS also supports opportunities for the action agency and the applicant to participate in the development of biological opinions our existing regulations provide. We would like to work with the Committee to expand meaningful participation, including states, in a way that would continue to allow us to meet our statutory deadlines for completing opinions.

Mr. Chairman, while there may be some issues that we may need to resolve administratively or with your help, NOAA Fisheries recognizes we must continue to ensure that we integrate better science into our policy decisions, and that our process must be transparent to gain public confidence in our efforts to recover species. We believe H.R. 4840 includes some provisions to help move us in that direction. We look forward to working with the Committee and our partner-agency, the USFWS, to improve the implementation of the Endangered Species Act.

This concludes my testimony, Mr. Chairman. I would be glad to answer any questions you may have.